



State of Arizona
Department of Education

Tom Horne
Superintendent of
Public Instruction

CN# 46-06

MEMORANDUM

To: School Health & Nutrition Program Sponsors
From: Mary Szafranski, Deputy Associate Superintendent
Arizona Department of Education, Health & Nutrition Services
Date: May 16, 2006
RE: Procurement Questions Relevant to the Buy American Provision

This memo is in response to a number of questions received by the United States Department of Agriculture (USDA) concerning the National School Lunch Program (NSLP) and School Breakfast Program (SBP) Buy American provision. Below is a list of questions and answers for school food authorities.

- Q. What are the requirements of the Richard B. Russell National School Lunch Act's (NSLA) Buy American provision that must be followed when purchasing food and food products for use in the Child Nutrition Programs?
- A. **A new provision added to the National School Lunch Act (NSLA) requires LEAs to purchase domestically grown and processed foods, to the maximum extent practicable. In addition any purchases made in accordance with the Buy American provision must still follow the applicable procurement rules calling for free and open competition. Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336), Section 12(n) of NSLA (42 USC 1760(n))**
- Q. How would an LEA determine a manufactured good is a "domestic commodity or product"?
- A. **"Domestic commodity or product" is defined as one that is produced and processed in the United States substantially using agricultural commodities that are produced in the United States. "Substantially" is defined as over 51% of the final processed product consists of agricultural commodities that were grown domestically.**

Q. Are there any exceptions to the requirement of the Buy American provision?

A. **Yes. There are two situations which warrant a waiver to permit purchases of foreign products. 1) The product is not produced or manufactured in the U.S. in sufficient and reasonable available quantities of a satisfactory quality; and 2) Competitive bids reveal the costs of a U.S. product is significantly higher than the foreign.**

Q. Does the Buy American provision apply to entities that purchase on behalf of an LEA, such as a purchasing cooperative or a food service management company?

A. **Yes. Any entity that purchases food or food products on behalf of the LEA must follow the same Buy American provision that the LEA is required to follow.**

Q. Does the Buy American provision apply only to purchases made using Federal funds under the Child Nutrition Programs?

A. **No. LEAs must ensure that all procurements using funds from the nonprofit school food service account comply with the Buy American provision. Pursuant to Child Nutrition Program regulations, all Federal funds, all money received from children as payment for program meals, all proceeds from the sale of competitive foods, and all other income generated by the school food service must be applied to the food service account. Therefore, the entire nonprofit school food service account becomes subject to Federal procurement standards.**

Q. What can an LEA do to comply with the requirements of the Buy American provision?

A. **There are a number of ways LEAs can comply with the provision. LEAs should be including a Buy American clause in all product specifications, bid solicitations, requests for proposals (RFPs), purchase orders, and other procurement documents issued. Additionally, LEAs are required by 7 CFR 3016.36(b) (2) to monitor contractor performance to ensure compliance with all contractual requirements, including the Buy American provision. LEAs can also ask their suppliers to provide certification as to the origin of the product which is discussed in more detail in the last question on page 3.**

Q. How should an LEA determine the country of origin for an end product?

A. **For manufactured end products, there is a two-part test to define end product: (1) the article must be manufactured in the United States; and (2) the cost of domestic components must exceed 50 percent of the cost of all the components. It is not enough to assume that a product with a well recognized American brand name or product supplied by a domestic foodservice distributor complies with the Buy American provision. LEAs should inquire further with**

their suppliers to determine the country of origin for an end product because some products sold in school meals may carry the name brand of domestic company but the product itself may derive from another country. LEAs should also examine product packaging as the Nutrition Labeling and Education Act of 1990 mandates that the country of origin for both domestic and imported food products be identified on the product labels.

Q. Should LEAs rely on the distributors' reliance on information from American suppliers about the amount of domestic content in the parts, components, and other elements they buy and use for their products?

A. According to the Federal Trade Commission, if given in good faith, entities can rely on information from foodservice distributors about the domestic content in the parts, components, and other elements contained in the product. However, rather than assume that the input is 100 percent U.S. made, LEAs would be wise to ask the supplier, i.e., manufacturer or distributor, for specific information about the percentage of U.S. content. LEAs can include in their bidding process a requirement for certification along the lines of: "We require that suppliers certify the percentage of U.S. content in products supplied to us. If you are unable or unwilling to make such certification, we will not purchase from you." Appearing under this statement could be the sentence, "We certify that our ____ have at least ____% U.S. content, "with space for the supplier to fill in the name of the product and its percentage of U.S. content.

Q. Doesn't this place some of the burden on the manufacturers and distributors of food and food products in the Child Nutrition Programs?

A. Yes. The ability to certify, as required by the terms of contract with the LEA, will require that manufacturers and processors look back far enough in the manufacturing process to be reasonably sure that any significant foreign content has been identified.